

UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

JOSE MONTES, individually; And All Others)
 Similarly Situated,)

Plaintiffs,)

v.)

BANK OF AMERICA NA; NATIONAL)
 UNION FIRE INSURANCE COMPANY OF)
 PITTSBURGH PA; DOES I through XX,)
 inclusive; ROE CORPORATIONS I through)
 XX, inclusive,)

Defendants.)

2:13-cv-660-RCJ-VCF

ORDER

Currently before the Court are Bank of America, NA's Motion to Dismiss (#6) and National Union Fire Insurance Company of Pittsburgh PA's Motion to Dismiss (#7).

BACKGROUND

In April 2013, Defendants National Union Fire Insurance Company of Pittsburgh, PA and Bank of America, NA filed a petition for removal based on diversity jurisdiction and attached Plaintiff Jose Montes's First Amended Complaint ("FAC") from the Eighth Judicial District in Clark County, Nevada. (Pet. for Removal (#1) at 1-2; FAC (#1) at 17-24). In the complaint, Plaintiff sued Bank of America, NA and National Union Fire Insurance Company of Pittsburgh PA (collectively "Defendants"). (FAC (#1) at 17).

The FAC alleged the following. (*Id.*). Bank of America was a bank operating in Nevada. (*Id.*). National Union Fire Insurance Company of Pittsburgh PA ("National Union") was an insurer selling insurance products in Nevada. (*Id.* at 18). Each and every Defendant was acting as an "agent" for each and every other Defendant. (*Id.*). Plaintiff was a Bank of America customer. (*Id.*). "Defendants solicited Plaintiff to purchase accident insurance

1 coverage.” (*Id.*). “Defendants, using written materials, engaged in a common scheme of
2 uniform sales advertised and offered accident coverage that would allegedly pay benefits to
3 Plaintiff up to a total of \$1,071,000.00.” (*Id.*). “Plaintiff contracted with Defendants to
4 purchase insurance for coverage benefits up to a total of \$1,071,000.00, paying monthly
5 premiums for more than four years.” (*Id.*). “Defendants, using written materials, engaged in
6 a common scheme of uniform sales, advertised and offered accident coverage that would pay
7 Plaintiff up to \$365,000 for Recovery at Home.” (*Id.*). “Plaintiff contracted with Defendants to
8 purchase insurance for accident coverage that would pay Plaintiff up to \$365,000 for Recovery
9 at Home.” (*Id.*).

10 The FAC alleged the following. (*Id.*). On February 6, 2012, Plaintiff was injured by a
11 motor vehicle, hospitalized for 6 weeks, and recovered at home for 46 weeks. (*Id.*). Plaintiff
12 made a claim for benefits under the policy but Defendants “wrongfully denied payment of
13 benefits for the claim.” (*Id.* at 19).

14 Plaintiff alleged eight causes of action. (*Id.* at 19-23). In the first cause of action,
15 Plaintiff alleged breach of contract against Defendants for failing to provide coverage that
16 Plaintiff agreed to pay for and failing to pay benefits under the policy as written. (*Id.* at 19).
17 In the second cause of action, Plaintiff alleged breach of the implied covenant of good faith
18 and fair dealing against Defendants for failing to disclose to Plaintiff that the policy did not
19 provide the coverage Defendants advertised and contracted to provide and for refusing to
20 provide coverage under the policy for hospitalization for “each day after 1 Day(s) of Medically
21 Necessary Confinement” as written in the policy. (*Id.* at 19-20). In the third cause of action,
22 Plaintiff alleged unjust enrichment against Defendants because they accepted, used, and
23 enjoyed the benefit of premiums paid by Plaintiff but did not deliver a policy or coverage to
24 Plaintiff that reflected the coverages and risks paid for by Plaintiff. (*Id.* at 20).

25 In the fourth cause of action, Plaintiff alleged negligence against Defendants because
26 Defendants owed Plaintiff a duty to disclose fully the terms of the insurance policy coverage
27 but failed to do so. (*Id.* at 21). In the fifth cause of action, Plaintiff alleged negligent training
28 and support. (*Id.*). Plaintiff alleged that Defendants had “trained its agents uniformly, using

1 the same written materials, and required the sales agents to use uniform sales material it
2 provided.” (*Id.*). Defendants had negligently trained and supported its sales agents because
3 the agents failed to fully disclose the terms of the insurance policy provisions advertised and
4 promised to Plaintiff. (*Id.*). In the sixth cause of action, Plaintiff alleged concealment, fraud,
5 and misrepresentation against Defendants. (*Id.* at 22). Plaintiff alleged that Defendants
6 intentionally and fraudulently concealed that the policy he purchased for \$1,071,000 did not
7 cover him for that amount and that the policy he purchased for Recovery at Home Benefit did
8 not cover him for that circumstance. (*Id.*). Plaintiff alleged that Defendants knew that the
9 policies did not cover him. (*Id.*).

10 In the seventh cause of action, Plaintiff alleged civil conspiracy because Defendants
11 conspired among themselves to intentionally conceal from Plaintiff that he was not getting the
12 insurance policy that he contracted and paid for. (*Id.* at 23). Defendants conspired to “prepare
13 uniform written sales materials and required its agents to use those uniform written sales
14 materials to sell Plaintiff an insurance policy Defendants knew concealed from Plaintiff that he
15 was not getting the insurance coverage he had contracted and was paying for.” (*Id.*). In the
16 eighth cause of action Plaintiff alleged “unfair business practices, statutory violations” but did
17 not identify any statutes. (*Id.*). Plaintiff alleged that Defendants’ actions were violations of
18 “both state and federal unfair business practices statutes” and violations of “both state and
19 federal insurance, banking and other regulatory statutes.” (*Id.*).

20 The pending motions now follow.

21 LEGAL STANDARD

22 When considering a Rule 12(b)(6) motion to dismiss for failure to state a claim, the
23 court must accept as true all factual allegations in the complaint as well as all reasonable
24 inferences that may be drawn from such allegations. *LSO, Ltd. v. Stroh*, 205 F.3d 1146, 1150
25 n.2 (9th Cir. 2000). Such allegations must be construed in the light most favorable to the
26 nonmoving party. *Shwarz v. United States*, 234 F.3d 428, 435 (9th Cir. 2000). In general, the
27 court should only look to the contents of the complaint during its review of a Rule 12(b)(6)
28 motion to dismiss. However, the court may consider documents attached to the complaint or

1 referred to in the complaint whose authenticity no party questions. *Id.*; see *Durning v. First*
2 *Boston Corp.*, 815 F.2d 1265, 1267 (9th Cir. 1987).

3 The analysis and purpose of a Rule 12(b)(6) motion to dismiss for failure to state a
4 claim is to test the legal sufficiency of a complaint. *Navarro v. Block*, 250 F.3d 729, 732 (9th
5 Cir. 2001). The issue is not whether a plaintiff will ultimately prevail but whether the claimant
6 is entitled to offer evidence to support the claims. *Gilligan v. Jamco Dev. Corp.*, 108 F.3d 246,
7 249 (9th Cir. 1997) (quotations omitted). To avoid a Rule 12(b)(6) dismissal, a complaint does
8 not need detailed factual allegations; rather, it must plead “enough facts to state a claim to
9 relief that is plausible on its face.” *Clemens v. Daimler Chrysler Corp.*, 534 F.3d 1017, 1022
10 (9th Cir. 2008) (quoting *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555, 127 S.Ct. 1955,
11 1964, 167 L.Ed.2d 929 (2007)); *Ashcroft v. Iqbal*, 556 U.S. 662, 678, 129 S.Ct. 1937, 1949,
12 173 L.Ed.2d 868 (2009) (stating that a “claim has facial plausibility when the plaintiff pleads
13 factual content that allows the court to draw the reasonable inference that the defendant is
14 liable for the misconduct alleged”). Even though a complaint does not need “detailed factual
15 allegations” to pass muster under 12(b)(6) consideration, the factual allegations “must be
16 enough to raise a right to relief above the speculative level . . . on the assumption that all the
17 allegations in the complaint are true (even if doubtful in fact).” *Twombly*, 550 U.S. at 555, 127
18 S.Ct. at 1965. “A pleading that offers ‘labels and conclusions’ or ‘a formulaic recitation of the
19 elements of a cause of action will not do.” *Iqbal*, 556 U.S. at 678, 129 S.Ct. at 1949. “Nor
20 does a complaint suffice if it tenders ‘naked assertion[s]’ devoid of ‘further factual
21 enhancements.’” *Id.* (quoting *Twombly*, 550 U.S. at 557, 127 S.Ct. at 1966).

22 If the court grants a motion to dismiss a complaint, it must then decide whether to grant
23 leave to amend. The court should “freely give” leave to amend when there is no “undue delay,
24 bad faith or dilatory motive on the part of the movant . . . undue prejudice to the opposing party
25 by virtue of allowance of the amendment, [or] futility of amendment.” Fed. R. Civ. P. 15(a)(2);
26 *Foman v. Davis*, 371 U.S. 178, 182, 83 S.Ct. 227, 230, 9 L.Ed.2d 222 (1962). Generally,
27 leave to amend is only denied when it is clear that the deficiencies of the complaint cannot be
28 cured by amendment. See *DeSoto v. Yellow Freight Sys., Inc.*, 957 F.2d 655, 658 (9th Cir.

1 1992).

2 DISCUSSION

3 Bank of America filed a motion to dismiss all of the claims filed against it. (BOA Mot.
4 to Dismiss (#6) at 1). Bank of America argues the breach of contract claim against it fails
5 because it is a bank and not an insurer and does not have an insurance contract with Plaintiff.
6 (*Id.* at 11-12). Bank of America asserts that it cannot be liable for a bad faith insurance claim
7 because it is a bank and not an insurance company. (*Id.* at 12). Bank of America contends
8 that the unjust enrichment claim fails because there is an express written contract, i.e. the
9 insurance policy. (*Id.* at 13). Bank of America asserts that the negligence cause of action
10 cannot survive because Plaintiff's negligence claim is a repackaging of his contract claim to
11 which he has no contract with Bank of America. (*Id.* at 14). Bank of America asserts that the
12 negligent training and support claim is devoid of any factual support. (*Id.* at 14-15). Bank of
13 America asserts that Plaintiff fails to plead his concealment, fraud, and misrepresentation
14 claim with Federal Rule of Civil Procedure 9(b) particularity. (*Id.* at 15-16). Bank of America
15 argues that Plaintiff fails to plead the elements of civil conspiracy or any facts with particularity
16 specifying the manner in which Bank of America joined in the conspiracy or how it participated
17 in it. (*Id.* at 17). Bank of America contends that unfair business practices claim is vague and
18 conclusory. (*Id.* at 18). Bank of America contends that Plaintiff does not have standing to
19 bring a state unfair business practices claims because the Nevada Department of Insurance
20 has exclusive jurisdiction over such claims. (*Id.* at 19). Bank of America argues that to the
21 extent that Plaintiff is alleging an Unfair Insurance Practices Act claim, those statutory sections
22 apply to insurance companies, not banks. (*Id.* at 20). Alternatively, Bank of America seeks
23 a more definitive statement because the FAC is so vague and ambiguous that it cannot
24 reasonably frame a responsive pleading. (*Id.*).

25 National Union files a motion to dismiss the second through eighth causes of action.
26 (Nat'l Union Mot. to Dismiss (#7) at 1). National Union argues that Plaintiff only sets forth
27 conclusory allegations for a claim of bad faith but fails to set forth facts to establish the claim.
28 (*Id.* at 11). National Union asserts that the unjust enrichment claim fails as a matter of law

1 because there is an express, written contract—i.e. the insurance policy. (*Id.* at 11-12). National
2 Union argues that this Court should adopt California’s law that negligence is not a theory of
3 recovery available against insurers. (*Id.* at 14). National Union asserts that the negligent
4 training and support claim should be dismissed because it is devoid of any factual support.
5 (*Id.* at 14-15). National Union contends that Plaintiff does not factually or legally allege a claim
6 for concealment, fraud, or misrepresentation and does not plead any facts with particularity.
7 (*Id.* at 16-17). National Union asserts that Plaintiff fails to plead sufficient facts to state a claim
8 for civil conspiracy and that it should be dismissed. (*Id.* at 17-18). National Union argues that
9 Plaintiff’s claim for unfair business practices is vague and conclusory and that National Union
10 does not know what statutes and regulations it is being accused of violating. (*Id.* at 18).
11 National Union asserts that Plaintiff lacks standing to bring a claim for unfair business
12 practices because the Nevada Insurance Commissioner has exclusive jurisdiction over alleged
13 unfair trade practices by an insurance company. (*Id.* at 19). With respect to the Unfair
14 Insurance Practices Act, National Union asserts that there are 16 possible provisions that an
15 insurer may be liable under and that Plaintiff has not identified which specific section National
16 Union allegedly violated and has not alleged any facts which support a violation. (*Id.* at 20-22).
17 Alternatively, National Union argues that Plaintiff should be required to provide a more definite
18 statement on claims two through eight so that it may be able to frame a responsive pleading.
19 (*Id.* at 22).

20 In response, Plaintiff argues that he has stated a claim against Bank of America
21 because it acted as the insurance broker/agent and sold the insurance policy to Plaintiff.
22 (Opp’n to Mots. to Dismiss (#9) at 4). Plaintiff argues that it states a claim for bad faith against
23 Bank of America because Bank of America acted as an insurance broker/agent and sold the
24 policy to Plaintiff. (*Id.* at 5-6). Plaintiff asserts that he states a claim for unjust enrichment
25 because only an offer of coverage was made but no policy was delivered and, thus, no
26 express contract. (*Id.* at 6). Plaintiff contends that the economic loss doctrine does not bar
27 a claim for negligent misrepresentation against insurance brokers. (*Id.* at 7). Plaintiff argues
28 that he sufficiently states a claim for negligent training and support. (*Id.* at 8-9). Plaintiff

1 asserts that his concealment, fraud, and misrepresentation claim is pled with particularity
2 because a range of dates was given and asserts that names and specific dates need to be
3 gathered through discovery. (*Id.* at 9-10). Plaintiff argues that his claim for civil conspiracy
4 is properly pled. (*Id.* at 11). Plaintiff argues that his claim for unfair business practices is
5 properly pled and argues that the unfair practices act creates a private right of action. (*Id.* at
6 13). Plaintiff also argues that his allegations demonstrate a violation of NRS § 686A.310(1)(b)-
7 (e). (*Id.*).

8 In reply, Defendants assert that Plaintiff has pled elements of the various claims but not
9 supporting facts. (Reply to Mots. to Dismiss (#11) at 2). Defendants assert that, in Nevada,
10 claims for breach of contract do not exist against agents of insurers in the context of insurance
11 disputes. (*Id.* at 3). Defendants note that Plaintiff does not address their request for a more
12 definite statement. (*Id.* at 9).

13 **A. First Claim: Breach of Contract**

14 In Nevada, if an insurance agent does something within the scope of his agency that
15 violates the terms of the insurance contract, a plaintiff's only recourse is to sue the insurance
16 company as the agent's principal and as the signatory to the contract. *Vargas v. California*
17 *State Auto. Ass'n Inter-Ins. Bureau*, 788 F.Supp. 462, 464 (D. Nev. 1992). Additionally, if an
18 agent does something outside the scope of his agency to harm a plaintiff, such act could not
19 properly be brought as a breach of contract action because the agent had no contractual
20 relationship with the plaintiff. *Id.*

21 In this case, Plaintiff alleges that Bank of America is National Union's insurance agent.
22 As such, the Court finds that Bank of America, as an agent, is not a party to the insurance
23 contract and, thus, cannot be liable for breach of contract. The Court grants Bank of
24 America's motion to dismiss the first cause of action against it with prejudice.

25 **B. Second Claim: Breach of the Implied Covenant of Good Faith and Fair**
26 **Dealing**

27 The Nevada Supreme Court adopted a cause of action called "bad faith" in *U.S. Fid.*
28 *& Guar. Co. v. Peterson*, 540 P.2d 1070, 1071 (Nev. 1975). In Nevada, bad faith is defined

1 as: “(1) an insurer’s denial of (or refusal to pay) an insured’s claim; (2) without any reasonable
2 basis; and (3) the insurer’s knowledge or awareness of the lack of any reasonable basis to
3 deny coverage, or the insurer’s reckless disregard as to the unreasonableness of the denial.”
4 *Schumacher v. State Farm Fire & Cas. Co.*, 467 F.Supp.2d 1090, 1095 (D. Nev. 2006). The
5 Nevada Supreme Court has found that “[l]iability for bad faith is strictly tied to the
6 implied-in-law covenant of good faith and fair dealing arising out of an underlying contractual
7 relationship.” *United Fire Ins. Co. v. McClelland*, 780 P.2d 193, 197 (Nev. 1989). “When no
8 contractual relationship exists, no recovery for bad faith is allowed.” *Id.*

9 In this case, the Court grants Bank of America’s motion to dismiss the second cause
10 of action against it for bad faith with prejudice. As discussed above, Bank of America is not
11 a party to the insurance policy and, thus, there can be no cause of action for bad faith against
12 it.

13 With respect to National Union, the Court finds that Plaintiff has pled insufficient facts
14 to state a cause of action for bad faith, but grants leave to amend. The FAC alleges that
15 Plaintiff purchased accident insurance coverage from National Union that would pay benefits
16 up to a total of \$1,071,000.00 and up to \$365,000 for recovery at home. (See FAC (#1) at 18).
17 The FAC alleges that Plaintiff was in a motor vehicle accident and was hospitalized for 6
18 weeks and recovered at home for 46 weeks. (*Id.*). The FAC alleges that Plaintiff made a
19 claim for benefits under the policy and that Defendants denied payment of his claims. (*Id.* at
20 19). Based on these facts, the Court finds that Plaintiff has pled that National Union refused
21 to pay his claim but has not pled facts to demonstrate that the denial was “without any
22 reasonable basis” or that National Union had “knowledge or awareness of the lack of any
23 reasonable basis to deny coverage.” As such, the Court grants National Union’s motion to
24 dismiss this claim but grants Plaintiff leave to amend the complaint to provide more factual
25 allegations.

26 **C. Third Claim: Unjust Enrichment**

27 In Nevada, “[a]n action based on a theory of unjust enrichment is not available when
28 there is an express, written contract, because no agreement can be implied when there is an

1 express agreement.” *Leasepartners Corp. v. Robert L. Brooks Trust Dated November 12,*
2 *1975*, 942 P.2d 182, 187 (Nev. 1997). “The doctrine of unjust enrichment or recovery in quasi
3 contract applies to situations where there is no legal contract but where the person sought to
4 be charged is in possession of money or property which in good conscience and justice he
5 should not retain but should deliver to another [or should pay for].” *Id.*

6 In this case, the Court grants both Bank of America and National Union’s motion to
7 dismiss the unjust enrichment claim because there is an express, legal contract—i.e. the
8 insurance policy—that applies to this case. The Court dismisses this cause of action with
9 prejudice.

10 **D. Fourth Claim: Negligence**

11 The Court notes that, in the FAC, Plaintiff appears to be attempting to state a claim for
12 “negligence” based on Defendants breach of the duties to disclose the terms of the insurance
13 policy and pay the benefits under the policy. (See FAC (#1) at 21). In Plaintiff’s opposition,
14 he asserts that he states a claim for negligent misrepresentation and that such a claim is not
15 barred by the economic loss doctrine. (See Opp’n to Mot. to Dismiss (#9) at 7).

16 To prevail on a negligence theory in Nevada, a plaintiff must show that “(1) the
17 defendant owed a duty of care to the plaintiff; (2) the defendant breached that duty; (3) the
18 breach was the legal cause of the plaintiff’s injury; and (4) the plaintiff suffered damages.”
19 *Wiley v. Redd*, 885 P.2d 592, 595 (Nev. 1994). In order to prevail on a claim for negligent
20 misrepresentation, a plaintiff must plead: (1) a representation that is false; (2) that the
21 representation was made in the course of the defendant’s business or in any action in which
22 he has a pecuniary interest; (3) the representation was for the guidance of others in their
23 business transactions; (4) the representation was justifiably relied upon; (5) that such reliance
24 resulted in pecuniary loss to the relying party; and (6) that the defendant failed to exercise
25 reasonable care or competence in obtaining or communicating the information. *G.K. Las*
26 *Vegas Ltd. P’ship v. Simon Prop. Grp., Inc.*, 460 F.Supp.2d 1246, 1262 (D. Nev. 2006). A
27 plaintiff must plead negligent misrepresentation with Federal Rule of Civil Procedure 9(b)
28 particularity. *Id.*

1 Federal Rule of Civil Procedure 9(b) provides that “[i]n alleging fraud or mistake, a party
2 must state with particularity the circumstances constituting fraud or mistake. Malice, intent,
3 knowledge, and other conditions of a person’s mind may be alleged generally.” Fed. R. Civ.
4 P. 9(b). Under Rule 9(b), a plaintiff must be specific enough to give defendants notice of the
5 particular misconduct so that they can defend against the charge and not just deny that they
6 have done anything wrong. *Vess v. Ciba-Geigy Corp. USA*, 317 F.3d 1097, 1106 (9th Cir.
7 2003). “Averments of fraud must be accompanied by ‘the who, what, when, where, and how’
8 of the misconduct charged.” *Id.* A “plaintiff must set forth *more* than the neutral facts
9 necessary to identify the transaction. The plaintiff must set forth what is false or misleading
10 about a statement, and why it is false.” *Id.*

11 After reviewing Plaintiff’s opposition to the motion to dismiss, the Court finds that
12 Plaintiff is attempting to plead negligent misrepresentation rather than negligence. The Court
13 notes that, in his opposition to the motion to dismiss, Plaintiff repeatedly argues that negligent
14 misrepresentation is an exception to the economic loss doctrine. As such, the Court believes
15 that Plaintiff’s FAC meant to allege negligent misrepresentation rather than negligence for the
16 fourth cause of action. Nonetheless, the Court finds that the fourth claim is insufficiently pled
17 because Plaintiff only makes the factual allegations that: (a) Defendants owed Plaintiff a duty
18 to disclose fully the terms of the insurance policy coverage, in both amount and scope; (b)
19 Defendants negligently failed to disclose the terms of the insurance policy coverage, both
20 amount and scope; and (c) Defendants negligently failed to pay benefits under the policy,
21 wrongly interpreted that the policy covered medically necessary confinement only after 31
22 days. (See FAC (#1) at 21). The Court finds that these allegations lack the particularity
23 required by Rule 9(b) because Plaintiff does not delineate between the actions of each
24 defendant and does not provide the who, what, when, where, and how of the false
25 representations. The Court grants both Bank of America and National Union’s motion to
26 dismiss the fourth cause of action but grants leave to amend to state a cause of action for
27 negligent misrepresentation.

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1 **E. Fifth Claim: Negligent Training and Support**

2 To state a claim for negligent training and supervision in Nevada, Plaintiff must show
3 (1) a general duty on the employer to use reasonable care in the training and/or supervision
4 of employees to ensure that they are fit for their positions; (2) breach; (3) injury; and
5 (4) causation. *Okeke v. Biomat USA, Inc.*, 927 F.Supp.2d 1021, 1028 (D. Nev. 2013). “Claims
6 for negligent training and supervision are based upon the premise that an employer should be
7 liable when it places an employee, who it knows or should have known behaves wrongfully,
8 in a position in which the employee can harm someone else.” *Id.* However, an “employee’s
9 wrongful behavior does not in and of itself give rise to a claim for negligent training and
10 supervision.” *Id.*

11 In this case, Plaintiff alleges that “Defendants trained its agents uniformly, using the
12 same written materials, and required the sales agents to use uniform sales material it
13 provided” and that “Defendants negligently trained and supported its sales agents, such that
14 those agents failed to disclose fully the terms of the insurance policy provisions advertised and
15 promised to Plaintiff.” (See FAC (#1) at 21). The Court finds that these allegations are
16 insufficient to state a claim for negligent training and grants Plaintiff leave to amend. The
17 allegations do not provide any facts about what the written materials say, what the sales
18 agents are trained to say, or what information the agents failed to disclose. Moreover, Plaintiff
19 does not identify the various actions of the two Defendants, one of whom he alleges is the
20 agent of the other. The Court grants both Bank of America and National Union’s motion to
21 dismiss this cause of action with leave to amend.

22 **F. Sixth Claim: Concealment, Fraud, Misrepresentation**

23 To state a claim for fraudulent misrepresentation in Nevada, a plaintiff must establish:
24 (1) a false representation made by the defendant; (2) defendant’s knowledge or belief that its
25 representation was false or that defendant has an insufficient basis of information for making
26 the representation; (3) defendant intended to induce plaintiff to act or refrain from acting upon
27 the misrepresentation; and (4) damage to the plaintiff as a result of relying on the
28 misrepresentation. *Barmettler v. Reno Air, Inc.*, 956 P.2d 1382, 1386 (Nev. 1998). To state

1 a claim for fraudulent concealment in Nevada, a plaintiff must establish: (1) defendant must
2 have concealed or suppressed a material fact; (2) defendant must have been under a duty
3 to disclose the fact to the plaintiff; (3) defendant must have intentionally concealed or
4 suppressed the fact with the intent to defraud the plaintiff, that is, he must have concealed or
5 suppressed the fact for the purpose of inducing the plaintiff to act differently than he would if
6 he knew the fact; (4) plaintiff must have been unaware of the fact and would not have acted
7 as he did if he had known of the concealed or suppressed fact; and (5) as a result of the
8 concealment or suppression of the fact, the plaintiff must have sustained damages. *Nevada*
9 *Power Co. v. Monsanto Co.*, 891 F.Supp. 1406, 1415 (D. Nev. 1995). Both fraudulent
10 misrepresentation and fraudulent concealment must be pled with Rule 9(b) particularity. See
11 Fed. R. Civ. P. 9(b).

12 The Court finds that Plaintiff has not pled either of these claims with Rule 9(b)
13 particularity. A review of the complaint demonstrates that Plaintiff conclusively states that
14 Defendants “intentionally and fraudulently concealed” various policy provisions and amounts
15 but provides no details as to the who, what, when, where, and how of the alleged fraud. As
16 such, the Court grants both Bank of America and National Union’s motion to dismiss the sixth
17 cause of action for concealment, fraud, misrepresentation with leave to amend.

18 **G. Seventh Claim: Civil Conspiracy**

19 In Nevada, “[a]n actionable civil conspiracy is a combination of two or more persons
20 who, by some concerted action, intend to accomplish some unlawful objective for the purpose
21 of harming another which results in damage.” *Collins v. Union Fed. Sav. & Loan Ass’n*, 662
22 P.2d 610, 622 (Nev. 1983).

23 In this case, the Court finds that Plaintiff only makes conclusory allegations for this
24 cause of action. To illustrate, Plaintiff alleges that “Defendants conspired among themselves,
25 and with others, to intentionally conceal from Plaintiff that he was not getting the insurance
26 policy that he contracted and paid for” and that “Defendants conspired to prepare uniform
27 written sales materials and required its agents to use those uniform written sales materials to
28 sell Plaintiff an insurance policy Defendants knew concealed from Plaintiff that he was not

1 getting the insurance coverage he had contracted and was paying for.” (See FAC (#1) at 23).
2 The Court finds that these allegations only recite naked assertions devoid of further factual
3 enhancements. The Court grants both Bank of America and National Union’s motion to
4 dismiss this cause of action with leave to amend.

5 **H. Eighth Claim: Unfair Business Practices, Statutory Violations**

6 The Court grants Bank of America and National Union’s motion to dismiss this cause
7 of action because Plaintiff alleges that Defendants violated “both state and federal unfair
8 business practices statutes” and “both state and federal insurance, banking and other
9 regulatory statutes” but never identifies any of these alleged statutes and does not allege how
10 they allegedly violated these statutes. The Court grants Plaintiff leave to amend this cause
11 of action.

12 **CONCLUSION**

13 For the foregoing reasons, IT IS ORDERED that Bank of America, NA’s Motion to
14 Dismiss (#6) is GRANTED. The Court dismisses with prejudice the first (breach of contract),
15 second (breach of implied covenant of good faith and fair dealing), and third (unjust
16 enrichment) claims against Bank of America, NA. The Court dismisses with leave to amend
17 the fourth (negligent misrepresentation), fifth (negligent training), sixth (concealment, fraud,
18 misrepresentation), seventh (civil conspiracy), and eighth (unfair business practices) claims
19 against Bank of America, NA.

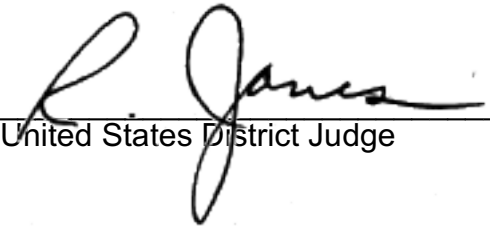
20 IT IS FURTHER ORDERED that National Union Fire Insurance Company of Pittsburgh
21 PA’s Motion to Dismiss (#7) is GRANTED. The Court dismisses with prejudice the third claim
22 for unjust enrichment against National Union. The Court dismisses with leave to amend the
23 second (breach of the covenant of good faith and fair dealing), fourth (negligent
24 misrepresentation), fifth (negligent training), sixth (concealment, fraud, misrepresentation),
25 seventh (civil conspiracy), and eighth (unfair business practices) claims against National
26 Union.

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1 IT IS FURTHER ORDERED that Plaintiff has 20 days from the date of this order to file
2 a second amended complaint.

3 Dated this 30th day of October, 2013.

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7 United States District Judge
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